90-283

(1)

Supreme Court, U.S.
FILED
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CLERK

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

CHARLES FREDERICK SCHWARK, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PAUL W. CALHOUN, JR.
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QUESTION PRESENTED FOR REVIEW

Whether sufficient predicate offenses existed under 18 U.S.C. 924(c)(1) to support the consecutive sentences imposed on appellant so as not to violate the double jeopardy clause.

PARTIES TO THE PROCEEDINGS

Trial Judge:

Honorable Dudley Bowen
United States District Judge
Southern District of Georgia

Plaintiff:

United States of America

Defendant:
Charles Frederick (Chuck) Schwark, Jr.

Counsel for Plaintiff:

J. Michael Faulkner
Assistant United States Attorney
P.O. Box 2017
Augusta, GA 30903

Thomas M. Gannon, Attorney
Department of Justice
Washington, D.C. 20530

Counsel for Defendant:

Paul W. Calhoun, Jr.
P.O. Box 1047
Vidalia, GA 30474

Other Parties with Possible Interest in the Outcome of the Case.

This is a criminal case. There are no identifiable victims.

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RULES

FRAP 3 3

IN THE

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CHARLES FREDERICK SCHWARK, JR.,
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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPORTS AND JURISDICTION

On May 16, 1990, the Eleventh Circuit Court of Appeals entered its per curiam opinion in No. 89-8952, affirming the Judgment in Docket Number CR188-018 in the United States District Court for the Southern District of Georgia. See Appendix A.

This Court has jurisdiction to review this case under Article III, Sec. 2, Clause 1 of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES

No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any

person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation. 5th Amendment, U.S. Constitution.

Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein. 18 U.S.C. 924(c)(1).

STATEMENT OF THE CASE

Petitioner was convicted following a jury trial in the Southern District of Georgia of conspiracy to distribute and possession with intent to distribute cocaine, methamphetamine and marijuana in violation of 21 U.S.C. 841(a)(1) from 1985 until November 4, 1988 (Count 1); of two counts of distributing and possession with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) Count 2 on June 6, 1987, and 4 on August 28, 1987 (Petitioner was acquitted on Count 3); and three counts of possessing a firearm during a drug trafficking offense in violation of 18 U.S.C. 924(c)(1); Counts 5 between June and December, 1987, 6 between September 28 and October 13, 1988, and 7 between May through September, 1988).

Petitioner was sentenced to a total of 397 months imprisonment consisting of consecutive terms of imprisonment of 97 months on Count 1, 60 months on Count 5, 120 months on Count 6, 120 months on Count 7, and consecutive five year terms of imprisonment on Counts 2 and 4, to run concurrently with the sentences on Counts 1, 5, 6, and 7, to be followed by a five year period of supervised release. A special assessment of $300 was also imposed.

The trial court's jurisdiction was based upon violation of Federal Criminal Statutes. The Appellate Court's jurisdiction was based upon 28 U.S.C. 1291 and FRAP 3.

ARGUMENT

In *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) this court devised the test to determine whether two statutory violations constitute two offenses for the purpose of the Double Jeopardy Clause.

The test to be applied to determine whether there are two offenses or one is whether each provision requires proof of a fact which the other does not.

In *United States v. Chalan*, 812 F.2d 1302 (10th Cir. 1987) the defendant had committed robbery and felony murder. The court held that all the facts needed to convict for robbery were needed to convict for the felony murder. Thus the underlying crime constituted a single offense for double jeopardy purposes and a single "crime of violence" within the meaning of Section 924(c).

In *U.S. v. Henry*, 878 F.2d 937 (6th Cir. 1989) the defendant was charged with carrying one gun and having two more guns stashed in his house. The indictment charged two separate 924(c) violations in connection with an underlying drug transaction. The court vacated Henry's conviction on one of the counts holding that the failure to charge that the guns were used in relation to separate predicate offenses was fatal.

In *Chalan*, the Court stated:

> "Nothing there indicates that Congress foresaw or considered how a court should determine the number of crimes of violence [for 924c purposes] that have occurred in a single criminal transaction."

The single predicate offense for which Petitioner was tried and convicted (conspiracy to distribute and possess with intent to distribute cocaine, methamphetamine and marijuana in violation of 21 U.S.C. 841(a)(1) from 1985 until November 4, 1988, will not support multiple 924(c) violations absent a violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States.

CONCLUSION

Accordingly, this Court should grant its Writ of Certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

PAUL W. CALHOUN, JR.
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(912) 537-7933
Attorney of Record for Petitioner

APPENDICES

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-8952

Non-Argument Calendar

D.C. Docket No. CR188-018

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES FREDERICK SCHWARK, JR.,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Georgia

(May 16, 1990)

Before TJOFLAT, Chief Judge, FAY and JOHNSON,
Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir. Rule 36-1.

Judgment Entered: May 16 1990

FOR THE COURT:
MIGUEL J. CORTEZ
Clerk

By: /s/ David Maland
Deputy Clerk

Issued as Mandate: June 8, 1990.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

Case Number CR188-00018-01

UNITED STATES OF AMERICA

v.

CHARLES FREDERICK SCHWARK, JR.

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

[Filed, Nov. 22, 1989]

Michael C. Garrett
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) ———————————.

☒ was found guilty on count(s) 1, 5, 6 and 7 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 USC § 846	Conspiracy	1
18 USC § 924(c)(1)	Possession of firearm during commission of a felony	5,6,7

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) ————, and is discharged as to such count(s).

☐ Count(s) ———— (is) (are) dismissed on the motion of the United States.

☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

☒ It is ordered that the defendant shall pay to the United States a special assessment of $200.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
587-50-7949

Defendant's mailing address:
Custody of U.S. Marshal

Defendant's residence address:

November 8, 1989

/s/ Dudley H. Bowen, Jr.
DUDLEY H. BOWEN, JR.
United States District Judge

November 21, 1989

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Three hundred and ninety seven (397) months. This term consists of 97 months on Count 1; 60 months on Count 5 to be served consecutively to Count 1; 120 months on Count 6 to be served consecutively to Counts 1 and 5; and 120 months on Count 7, to be served consecutively to Counts 1, 5 and 6.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district,

☐ at —— a.m. / p.m. on ————.

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on ————.

☐ as notified by the United States Marshal.

☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on ——— to ——— at ———, with a certified copy of this Judgment.

———————————

United States Marshal

By ———————————

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

The defendant shall not possess or use a fiream of any type.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history of characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

Case Number CR188-00018-01

UNITED STATES OF AMERICA

v.

CHARLES FREDERICK SCHWARK, JR.

Nov. 22, 1989

Michael C. Garrett, Attorney for Defendant

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT ENTERED A PLEA OF:

[☐ guilty ☐ nolo contendere] as to count(s) ———, and

☒ not guilty as to count(s) All counts.

THERE WAS A:

[☐ finding ☒ verdict] of guilty as to count(s) 2 and 4.

THERE WAS A:

[☐ finding ☐ verdict] of not guilty as to count(s) 3.

☐ judgment of acquittal as to count(s) 3
The defendant is acquited and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: Distribution of a Schedule II controlled substance, cocaine, as charged in Counts 2 and 4.

IT IS THE JUDGMENT OF THIS COURT THAT: As to Count 2, it is Ordered that the defendant is hereby committed to the custody of the Bureau of Prisons for a period of FIVE (5) YEARS under the provisions of 18 USC § 4205(a). As to Count 4, it is Ordered that the defendant is hereby committed to the custody of the Bureau of Prisons for a period of FIVE (5) YEARS under the provisions of 18 USC § 4205(a). The sentence imposed in Count 4 shall run consecutively to the sentence imposed in Count 2. Counts 2 and 4 shall run concurrently with the guideline sentence imposed in Counts 1, 5, 6 and 7.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult with prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $100.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) 2 and 4 as follows:

IT IS FURTHER ORDERED THAT counts ——— are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the Clerk of Court for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

☐ The Court orders commitment to the custody of the Attorney General and recommends:

November 8, 1989
Date of Imposition of Sentence

/s/ Dudley H. Bowen, Jr.
DUDLEY H. BOWEN, JR.
United States District Judge
November 21, 1989

RETURN

I have executed this Judgment as follows:

Defendant delivered on ——— —to ——— at ———, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

———————————

United States Marshal

By ———————————

Deputy Marshal